

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 1999-033-C - ORDER NO. 1999-665  
SEPTEMBER 21, 1999

IN RE: ITC^DeltaCom Communications, Inc.,	)	ORDER DENYING
	)	MOTION TO STRIKE
Complainant,	)	
	)	
vs.	)	
	)	
BellSouth Telecommunications, Inc.,	)	
	)	
Respondent.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Motion to Strike the major portion of the testimony of BellSouth Telecommunications, Inc. (BellSouth) witness Albert Halprin in this Complaint matter, filed by ITC DeltaCom Communications, Inc. (ITC). ITC alleges that Halprin's testimony contains improper and inadmissible legal argument and conclusions of law. Further, according to ITC, Halprin offers legal opinions concerning the interpretation of the Telecommunications Act of 1996, various rules and decisions of the Federal Communications Commission (FCC), the decisions of other state commissions, and the interconnection agreement at issue in this proceeding. ITC notes that testimony that consists of conclusions of law is inadmissible under the South Carolina case law, and that the Commission has previously applied this principle to bar legal opinion testimony in Docket No. 93-503-C. ITC compares Halprin's testimony to that barred in that docket

and concludes that Halprin's testimony constitutes an impermissible invasion of the exclusive province of this Commission and should not be allowed.

BellSouth responds to the Motion by pointing to Rules 702 and 704 of the South Carolina Rules of Evidence, which were promulgated after our striking of the testimony in Docket No. 93-503-C. Rule 702 states "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. " Further Rule 704 which addresses the use of an opinion on an ultimate issue, states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

We note that Halprin's testimony discusses the FCC's characterization of internet-bound traffic and his belief that BellSouth's position with regard to reciprocal compensation reflects that characterization. He also discusses the requirements of the Telecommunications Act of 1996, and the implementation of this Act by the FCC. Further, he discusses various state commission decisions, and why the language of the interconnection agreement between the two parties is allegedly in conformance with the FCC's longstanding treatment of Internet Service Provider (ISP) traffic as interstate. In other words, according to BellSouth, Halprin's testimony relates directly to the ultimate issue that is before this Commission for review.

Further, it appears that Halprin's former position as Chief of the FCC's Common Carrier Bureau makes him an expert with regard to this particular question now before us.

In examining the positions of both parties, we believe that ITC's Motion to Strike should be denied. Halprin is clearly an expert who, as described in Rule 702, can help us to understand the evidence or determine a fact in issue, i.e. with regard to the latter, whether reciprocal compensation should be paid for termination of ISP traffic. Second, it is also clear that Halprin's testimony is an opinion on an "ultimate issue of fact," as described in Rule 704, again, as to whether reciprocal compensation should be paid under the circumstances of the complaint.

We also differentiate this case from Docket No. 93-503-C. In that case, even if the Rules had been in effect, Professor Adams' testimony would have been improper as an opinion on a matter of law. Adams attempted to discuss whether or not the Commission had the power to issue refunds under the circumstances of that Docket. That issue went to the actual jurisdiction of the Commission as a matter of law, and was therefore in violation of the case law prohibiting testimony on ultimate issues of law. In the present case, Halprin, although discussing some matters of law, discusses the ultimate factual issue in question, i.e. whether or not reciprocal compensation should be paid for ISP traffic. We think the two situations are distinguishable.


We also note that, under our ruling, the Commission will be able to judge the credibility of the evidence, and afford it whatever weight we deem appropriate. We have the right to believe it in its entirety, believe portions of it, or reject it completely. We believe that this is the best approach under the circumstances of this case. Therefore, the Motion to Strike is denied.

This Order shall remain in full force and effect until further Order of the  
Commission.


BY ORDER OF THE COMMISSION:

VICE

Chairman



ATTEST:



Executive Director

(SEAL)